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No. 91-880

Supreme Court, U.S.

FILED

JAN 31 1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

RONALD JOSEPH PUMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in sentencing petitioner to a more severe sentence than it imposed on a co-defendant who pleaded guilty to a less serious offense.

2. Whether the district court made sufficient findings of fact concerning information contained in the presentence report.



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 937 F.2d 151.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1991. A petition for rehearing was denied on August 29, 1991. Pet. App. 19-20. The petition for a writ of certiorari was filed on November 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiracy to manufacture and dis-

tribute amphetamine, in violation of 21 U.S.C. 846 (Count 1); engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 2); money laundering, in violation of 18 U.S.C. 1956 (Counts 3 and 4); possession of amphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 37, 38, and 56); manufacturing amphetamine, in violation of 21 U.S.C. 841(a)(1) (Count 39); interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3) (Counts 44, 50, 61, and 66); and distribution of amphetamine, in violation of 21 U.S.C. 841(a)(1) (Counts 52 and 59). He was sentenced to 360 months' imprisonment, to be followed by a three-year term of supervised release, and he was ordered to forfeit property that he obtained from the profits of the criminal enterprise. The court of appeals affirmed. Pet. App. 1-18.

1. Petitioner was a member of a large-scale criminal enterprise that manufactured and distributed amphetamine throughout Texas and several other States from February 1986 to September 1989. In the initial phase of the enterprise, Robert Payne and Ernest Dodd were in charge of manufacturing the amphetamine. Payne arranged for the distribution of the amphetamine through numerous lower-level members of the organization. In the spring of 1988, Payne learned that petitioner was Dodd's source for the liquid amphetamine used in the manufacturing process. Payne and petitioner cut Dodd out of the enterprise, and petitioner became the sole supplier of liquid amphetamine to Payne, who processed the chemical into its powdered form and distributed it through his organization. From late 1986 until January 1989, the organization distributed approximately 20 pounds of amphetamine per month, which sold on

the street for up to \$1,600 per ounce. Petitioner laundered the income from the sale of the amphetamine through two businesses he owned. Pet. App. 2-4; Gov't C.A. Br. 4-15; Presentence Report 1-4.

2. The Presentence Report concluded that petitioner's sentence should be based on an offense level of 42 and a criminal history category of I, resulting in a sentencing range of 360 months to life imprisonment. The Report assigned an offense level of 36 to the drug offense, assessed a four-level increase for petitioner's role as a leader of criminal activity that involved five or more participants (Sentencing Guidelines § 3B1.1(a)), and assessed an additional two-level increase for obstruction of justice (Sentencing Guidelines § 3C1.1).

Petitioner filed written objections to the Presentence Report asserting, *inter alia*, that the Report incorrectly suggested that (1) petitioner had been involved in the criminal enterprise since April 1986; (2) he had been a top-level executive of the enterprise for the whole period of the conspiracy; and (3) as a top-level executive, he was fully cognizant of the extent and nature of the conspiracy. In its response, the government stated that the evidence at trial established that petitioner was a principal member of a large-scale criminal enterprise that existed from at least April 1986; that Payne turned to petitioner as his exclusive source of supply of liquid amphetamine in February or March 1988; and that petitioner had been supplying Dodd with liquid amphetamine prior to March 1988. Pet. App. 21, 26.

At the sentencing hearing, after explicitly considering petitioner's objections "point by point," the district court found that petitioner was a principal figure in the large-scale drug enterprise, and that, in

fact, he was one of three top-level executives in that enterprise. Sentencing Tr. 5. The court overruled petitioner's other objections to the Presentence Report, finding that the government's written response to his objections to the Report correctly summarized the evidence at trial. Sentencing Tr. 5. The district court also rejected petitioner's claim that he should receive the same sentence as co-conspirator Payne, who had cooperated with the government, pleaded guilty to a lesser, pre-Guidelines offense, and been sentenced to 20 years' imprisonment. *Id.* at 3-6.

3. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 1-18. The court rejected petitioner's claims that the district court had failed to make adequate findings in response to his objections to the Presentence Report, and that his sentence was based on inaccurate information. Pet. App. 6-7. The court held that the district court's express rejection of petitioner's objections to the Presentence Report, which appeared in the record, satisfied the requirement of Fed. R. Crim. P. 32(c)(3)(D) that the trial court make findings as to allegations of factual inaccuracies in the Report. Pet. App. 7. The court noted that petitioner's only possible objection under Rule 32(c)(3)(D) was that the district court's findings had not been attached to the copy of the Presentence Report that was sent to the Bureau of Prisons. But the court of appeals noted that no prejudice resulted from that omission. Pet. App. 7.

The court also rejected petitioner's contention that the disparity between petitioner's sentence and that of his co-conspirator Payne rendered petitioner's sentence defective under the "spirit" of the Sentencing Guidelines. The court noted that "[t]he fact that another party received a lower sentence than [petitioner] does

not alone make [petitioner's] otherwise legal sentence a violation of the Sentencing Guidelines." Pet. App. 7-8.¹

ARGUMENT

1. Petitioner contends (Pet. 7-10) that his 30-year sentence is grossly disproportionate to the 20-year sentence received by his co-conspirator Payne, and that his sentence frustrates the Sentencing Guidelines' goal of eliminating sentencing disparities between similarly situated defendants. Petitioner's argument ignores the fact that petitioner and Payne are not similarly situated defendants. Unlike petitioner, Payne agreed to plead guilty and cooperate with the government. Indeed, Payne was a key government witness at petitioner's trial. Pursuant to a plea agreement, Payne was allowed to plead guilty to one pre-Guidelines conspiracy offense. Consequently, he was not sentenced under the Guidelines. Petitioner, in contrast, did not cooperate with the government, did not plead guilty, and was convicted of numerous serious Guidelines offenses. He was sentenced at the low end of the Guidelines range.

The fact that petitioner proceeded to trial and received a heavier sentence than Payne, who pleaded guilty, does not provide him a basis for attacking his sentence. *United States v. Stanley*, 928 F.2d 575, 582-583 (2d Cir.), cert. denied, 112 S. Ct. 141 (1991); *United States v. James*, 923 F.2d 1261, 1269-1270

¹ In addition, the court of appeals rejected petitioner's contentions that the Sentencing Guidelines violated the Sixth Amendment right to a jury trial; that the indictment was defective because it did not allege the quantities of amphetamine that he was charged with possessing; and that the forfeiture order was improper. Pet. App. 4-5, 8-11. Petitioner does not renew those contentions here.

(7th Cir. 1991); *United States v. Duncan*, 919 F.2d 981, 992 (5th Cir. 1990), cert. denied, 111 S. Ct. 2036 (1991); *United States v. White*, 869 F.2d 822, 826 (5th Cir.), cert. denied, 490 U.S. 1112 (1989); *United States v. Fields*, 689 F.2d 122, 128 (7th Cir.), cert. denied, 459 U.S. 1089 (1982). It is settled that a defendant who is sentenced within the Guidelines range cannot base a challenge to his sentence solely on the fact that a co-defendant received a lesser sentence. See *United States v. Beverly*, 913 F.2d 337, 359 (7th Cir. 1990) (mere showing of disparity in sentences among co-defendants does not establish an abuse of discretion; inference of impropriety arises only when a judge imposes disparate sentences on similar defendants without explanation); *United States v. Guerrero*, 894 F.2d 261, 267 (7th Cir. 1990) (same); *United States v. Pierce*, 893 F.2d 669, 678 (5th Cir. 1990) (same); *United States v. Boyd*, 885 F.2d 246, 248-249 (5th Cir. 1989) (same).²

2. Petitioner also contends (Pet. 10-13) that the district court failed to make the factual findings required by Fed. R. Crim. P. 32(c)(3)(D) in response

² Although petitioner asserts (Pet. 7) that the decision in this case conflicts with the decision of another court of appeals, he fails to identify the decision that creates the alleged conflict. Instead, petitioner cites (Pet. 9) several cases in which the courts have pointed to different circumstances justifying the different sentences received by different co-defendants, or where the court has remanded for resentencing because the basis for the district court's disparate upward departures for various co-defendants was unclear. None of the cases cited concerned a cooperating co-defendant who pleaded guilty to one offense and received a shorter sentence than a co-defendant who proceeded to trial and was convicted of numerous offenses. Consequently, petitioner's allegations of a circuit conflict are unfounded.

to his objections to information in his Presentence Report. In particular, petitioner alleges (Pet. 3-4, 11) that the Presentence Report exaggerated his role in the offense by suggesting that he had been part of the criminal enterprise since April 1986 and was a top-level executive during the entire period of the operation. That fact-bound claim is meritless.

As an initial matter, petitioner is incorrect in asserting that the Presentence Report suggested that petitioner was a top-level executive of the drug operation for its entire duration. The Report stated that federal law enforcement officials learned in April 1986 of the existence of the drug scheme; that the investigation continued for several years; and that the authorities learned that Payne and Puma were the main figures in the enterprise. Presentence Report 1. The Report further stated that Payne, Dodd, and petitioner were the top-level "executives" and the most culpable of the defendants. *Ibid.* The Report made clear, however, that petitioner's status as a top-level executive in the operation did not commence until the spring of 1988, when Payne learned that petitioner was Dodd's source for liquid amphetamine. The Report explained that eventually Payne and petitioner dispensed with Dodd, and that from March 1988 until July 1989, petitioner was Payne's exclusive supplier of liquid amphetamine. Presentence Report 2, 4.

The district court fully complied with Fed. R. Crim. P. 32(c)(3)(D), which requires the court to make findings as to the accuracy of a fact contested at sentencing or to make a determination that such a finding is unnecessary because the court does not intend to rely on the fact at sentencing. The finding need not be in any particular form, as long as the court of appeals is able to determine from the record whether

the district court found the challenged fact in favor of or against the defendant and whether the fact affected the sentence. *United States v. Funt*, 896 F.2d 1288 (11th Cir. 1990); *United States v. Burch*, 873 F.2d 765, 767-768 (5th Cir. 1989); *United States v. Per-rera*, 843 F.2d 73, 76 (4th Cir.), cert. denied, 488 U.S. 837 (1988).

In this case, the district court found that petitioner was a main figure in a large-scale criminal enterprise, and that he was one of the three top-level executives in that enterprise. Sentencing Tr. 5. The court further found that, as to petitioner's other objections to the report, the government's response correctly summarized the evidence. *Ibid.* It is thus clear from the record that the district court accepted the findings of the Presentence Report and rejected petitioner's objections. See *Perrera*, 842 F.2d at 76. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992